IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 164

MORRY LEVINE,
Petitioner,

against

UNITED STATES OF AMERICA,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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I

Replying to Government's footnote 1 (Government Memorandum, p. 2).

In footnote 1 on page 2 of its Memorandum in Opposition the government asserts that there is no inconsistency between the discarding of "purgation by oath" consummated by this Court in *Clark* v. *United States*, 289 U. S. 1 (see *United States* v. *Shipp*, 203 U. S. 563), and the holding in *Brown* v. *United States*, 359 U. S. 41 (O. T. 1958 No. 4) that a witness who has refused to answer questions before a grand jury may purge himself of his completed contempt by appearing before the court and the grand jury and answering the questions.

The situation is quite to the contrary of the government's contention.

If, as held by this Court in the *Brown* case, *supra*, the recalcitrant grand jury witness does relieve himself of the contempt committed by him before the grand jury by testifying under oath before the judge-grand jury, then clearly there has been a purging of a completed contempt and thereafter there could be no prosecution under Rule 42(b) for the same.

Hence, the conflict between the *Brown* case and the *Clark* and *Shipp* cases, *supra*, is clear and direct.

II

Replying to Government's Memorandum, pages 5-9.

At pages 5 to 9 of its Memorandum in Opposition the government treats the question of the secrecy of the proceedings in this case.

It would seem that the government's purported answer to petitioner's contentions on the issue of secrecy is that since petitioner's counsel was present, the proceedings were not too secret. In discussing the *Oliver*[a] case in footnote 6 on page 7 of its Memorandum the government points out that at no stage of the proceedings before that judge-grand jury did Oliver have counsel and asserts that that is what made that proceeding too secret. The government cannot successfully equate the right to a public trial with the right to counsel. The allowance of counsel to a defendant cannot be the equivalent of a public trial nor can the converse be the equivalent of the allowance of counsel.

In fact, in *Tanksley* v. *United States*, 145 F. 2d 58, the Court of Appeals reversed because of the deprivation of

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a. 333 U. S. 257.

that defendant's right to a public trial. Defendant's counsel was, as the opinion shows, present in court along with relatives and the press. Although there was less secrecy in the *Tanksley* case, *supra*, than in the instant case, the Court of Appeals reversed the conviction.

Similarly in *Davis* v. *United States*, 247 Fed. 394, all spectators were cleared from the courtroom, except relatives, members of the bar, newspaper reporters and defendant's attorneys, but the Court of Appeals reversed and ordered a new trial.

As the Court of Appeals in the *Davis* case cogently pointed out, relatives, attorneys, witnesses or newspaper reporters are not "the exclusive representatives of the public." *A fortiori* the petitioner's counsel was not a representative of the public.

Hence, the mere presence of counsel throughout the proceeding did not and could not afford petitioner a public trial.

The government at pages 8 and 9 of its Memorandum in Opposition contends further that no consideration should be given to the question of secrecy, because no prejudice has been shown. But, it is fundamental that, where the right to a public trial has been denied, prejudice is presumed absolutely. *Davis* v. *United States*, 247 Fed. 394, 398; *Tanksley* v. *United States*, 145 F. 2d 58; *People* v. *Jelke*, 308 N. Y. 56.

The fact that no specific objection was made does not prevent consideration of the error. The right to a public trial is so fundamental that the infringement thereof cannot be overlooked on appeal or in this Court because of counsel's failure to raise it in the trial court, nor was there any conscious waiver, if there could be, by petitioner of his Constitutional right to a public trial. The record is clear, however, that counsel for petitioner throughout the

trial sought a hearing on notice under Rule 42(b), which could only mean an open trial.

The government in its effort to show that no prejudice resulted to petitioner by reason of the secrecy of the proceedings (although, as pointed out above, prejudice is presumed) advances the proposition that the only phase of the proceedings on April 22, 1957, the day of petitioner's conviction for contempt, required to be public was the formal adjudication and sentence.

This again is the nice distinction attempted to be made between the purported efforts to obtain testimony from petitioner through the assistance of the trial court and the adjudication of contempt under Rule 42(a).

That distinction has no relationship to the reality of what transpired. The government, indeed, is aware of this point, because in an effort to preserve this putative distinction it in its Memorandum seeks to translate very clear, unambiguous, contrary language of the trial court. When on April 22, 1957 the court called petitioner to the stand (47-a) to put the questions to him and direct him to answer, it stated to petitioner's counsel that "we are proceeding in accordance with Rule 42(a)."

This statement the government in footnote 5 of its memorandum on page 7 translates to mean "that the court *would* proceed under Rule 42(a) if the petitioner were to persist in his disobedience of the court's directions to answer its questions". (Emphasis in original.)

No restatement of the court's language that it was proceeding under Rule 42(a) can avoid the fact that it considered that the proceedings about to be conducted by it were in substance and effect contempt proceedings.

It was, at the very least, if not earlier, when petitioner was called to the stand (46-a), that he was in jeopardy and that his right to an open hearing, as well as to all

the other rights of a defendant in a criminal contempt cause, accrued.

At that point the court knew that petitioner had despite its direction continued his refusal to answer before the grand jury and, as the government says (Memo., p. 9) "the formal adjudication • • • had clearly been foreshadowed • • •".

Whether it was, as the court described it, a proceeding under Rule 42(a) or as the Court of Appeals in the *Brown* case[b] described it, a proceeding ancillary to the grand jury, or as this Court considered it in the *Brown* case, *supra*, a continuation of the grand jury proceeding, the fact is that the entire proceedings on April 22, 1957 were in effect a trial because petitioner was in jeopardy of his liberty and in that event was entitled to have it conducted publicly.

The government's contention that the right to a public trial could only have accrued at the time of adjudication is contrary to reason and justice. It would reduce this right in this type of contempt case to an absurdity and a meaningless gesture. If the right to a public trial has a social purpose and function, then it is the proceedings which lead up to the adjudication or conviction whether of contempt or of any other crime which require the admission of the public. Certainly in a trial of a crime other than contempt no one would attempt to assert that the formal adjudication or conviction by the judge of a defendant was all that was required to be public.

In effect in this proceeding prior to the adjudication, the court was ascertaining the facts upon which it would make its determination whether it should adjudicate petitioner in contempt. The trial was all that went before the actual adjudication and the opening of these prior

b. 247 F. 2d 332.

proceedings to the public was essential to constitute it a valid and constitutional proceeding.

The secrecy here present so tainted the proceedings as to require a reversal.

III

The government contends that there were no issues of fact in this case on which it was necessary to hear evidence as otherwise it would be an intrusion into the purposes and motives of the grand jury or government counsel.

The preclusion of petitioner from demonstrating extenuating circumstances and, in view of the disparity between the offense under investigation and the punishment meted out, the failure of the government to present, and the refusal of the court to permit petitioner to obtain, any proof to show the purpose and significance of the grand jury investigation, the petitioner's relationship to the subject matter under investigation and the effect of his recalcitrance on the future of the investigation—in short, the deprivation of a trial—is not justified by this argument by the government, conventional though it may be. *Brown* v. *United States,* O. T. 1958, No. 4, dissenting op., pp. 4, 5. See concurring opinion of Frank, C.J., *United States* v. *Scully,* 225 F. 2d 113, 116-118.

And in the court below these very issues were sought by petitioner's counsel to be tried out. (40-a—42-a. See 53-a, 54-a.)

IV

Conclusion.

The denial of due process to the petitioner in the proceedings here and the failure to follow Rule 42(b) and the secrecy imposed on these proceedings and all the reasons set forth in the petition herein require the review of petitioner's conviction for criminal contempt for which purpose a writ of certiorari should be issued.

Respectfully submitted,

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J. BERTRAM WEGMAN,
Counsel for Petitioner.

ON WRIT OF CERTIORARI

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COURT OF APPEALS

FOR THE SECOND

CIRCUIT

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Petitioner's Brief

Certiorari has been granted to review petitioner's conviction for criminal contempt in refusing to answer certain questions in a grand jury inquiry (R. 48). Petitioner was sentenced to one (1) year imprisonment (R. 45). The Court of Appeals for the Second Circuit affirmed (R. 45-47). Petitioner is enlarged on bail (R. 45). The Court of Appeals stayed its mandate (R. 47).

Opinion Below

The *per curiam* opinion of the Court of Appeals (R. 45) is reported at 267 F. 2d 335. The District Court's decision (R. 29) is not officially printed.

Jurisdiction

The judgment of the Court of Appeals was dated and entered on June 2, 1959 (R. 47). Jurisdiction to review

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (R. 45–46) is reported at 267 F. 2d 335.

JURISDICTION

The judgment of the court of appeals was entered on June 2, 1959 (R. 47). The petition for a writ of certiorari was filed on July 1, 1959, and was granted on October 19, 1959 (R. 48). 361 U.S. 860. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The order granting the writ of certiorari (R. 48, 361 U.S. 860) limited the questions for consideration by the Court to Questions No. 1 and No. 2 presented by the petition. These questions are:

1. Whether the secrecy of the proceedings, including the adjudication and sentence for contempt under Rule 42(a) of the Federal Rules of Criminal Procedure, deprived petitioner of Due Process of Law in violation of the Fifth Amendment to the United States Constitution.

2. Whether the secrecy of the proceedings and of the adjudication and sentence of petitioner for criminal contempt under Rule 42(a) of the Federal Rules of Criminal Procedure deprived petitioner of a public trial as required by the Sixth Amendment to the United States Constitution.

CONSTITUTIONAL PROVISIONS, STATUTE, AND RULE INVOLVED

The Fifth Amendment provides in pertinent part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

The Sixth Amendment provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial * * *.

18 U.S.C. 401(3) provides:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> * * * * * *
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

Rule 42(a) of the Federal Rules of Criminal Procedure provides:

RULE 42. CRIMINAL CONTEMPT

(a) *Summary Disposition.*

A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

STATEMENT

On April 22, 1957, in the United States District Court for the Southern District of New York, Judge Richard H. Levet, acting under the authority of 18 U.S.C. 401(3), *supra*, and in accordance with Rule 42(a) of the Federal Rules of Criminal Procedure, *supra*, summarily adjudged petitioner in contempt of court for refusing, in the actual presence of the court, to obey an order of the court directing him to answer certain questions as a witness before a grand jury (R. 2–5, 39–43). Petitioner was sentenced to one year's imprisonment (R. 45). On appeal, the judgment of conviction was affirmed (R. 45–47).

The circumstances leading to the contempt judgment—which are briefly noted in the order of contempt (R. 2–3) and Judge Levet's certificate under Rule 42(a) (R. 3–5), and which, with one possible exception (see fn. 6, *infra*, p. 6), were identical in all material respects with those culminating in the

contempt judgment sustained in *Brown* v. *United States*, 359 U.S. 41[1]—were as follows:

On April 18, 1957, petitioner appeared pursuant to subpoena to testify as a witness before a grand jury for the Southern District of New York, which was engaged in investigating possible violations of Part II (the motor carrier provisions) of the Interstate Commerce Act, 49 U.S.C. 301, *et seq.* (R. 4, 5, 10, 16, 17). After being sworn and answering a few preliminary questions (R. 14–16), petitioner refused to answer a series of six questions on the ground that to do so might tend to incriminate him (R. 16–20).[2] He persisted in this refusal after being advised by the government attorney that the applicable statutes (see *Brown* v. *United States*, *supra*, 359 U.S. at 44–47) afforded petitioner complete immunity from prosecution as to any matter concerning which he might testify and that therefore he had no privilege against self-incrimination "before this Grand Jury in this inquiry" (R. 17–18).[3]

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[1] This case and *Brown* arose out of the same grand jury investigation, and involved the same judge and same counsel on both sides (R. 5–6; Brown R. [No. 4, Oct. Term, 1958] 6–7). The same questions were put to both witnesses in identical language (R. 4–5; Brown R. 5), and the procedure followed in the two cases was the same (cf. R. 3–5 with 359 U.S. at 42–44). Petitioner's grand jury appearance and the contempt conviction which grew out of it occurred approximately two weeks after the appearance and conviction of Brown (R. 2–5, 18; Brown R. 3–5).

[2] The subject matter of the questions, which are set forth in the contempt certificate (R. 4–5), has no present relevance.

[3] Petitioner's counsel was present in an anteroom adjoining the grand jury room throughout the questioning; petitioner was free to consult with him at any time during his interrogation, and on several occasions did so (R. 14, 16–17, 18).

Some time later on the same day, April 18, 1957, the grand jury and the government attorney appeared before Judge Levet in one of the regular courtrooms to request "the aid and assistance of the Court" in compelling petitioner to testify (R. 5). Petitioner and his counsel were also present (R 5–29).[4] After informing himself of what had transpired in the grand jury room by hearing the grand jury reporters read their stenographic notes (R. 13–21), and after hearing argument on various legal questions, including the scope of the immunity afforded a grand jury witness under the applicable statutes (R. 6–13, 21–18), the judge concluded on the basis of "all the facts and upon all the record" that the immunity granted by the pertinent statutes was as extensive as the constitutional privilege on which petitioner relied (R. 29). The judge accordingly ruled that petitioner "must answer" the questions and ordered him to appear before the grand jury on the following Monday, April 22, 1957, for that purpose (*ibid.*).

On Monday, April 22, 1957, petitioner again appeared before the grand jury and again refused to

[4] Petitioner states (though there is nothing in the record on the subject) that "[t]he courtroom was cleared" for these April 18th proceedings (Br. 4)—as it concededly was for the subsequent proceedings of April 22d (see *infra*, p. 6). Whatever the actual situation may have been in regard to the public or non-public character of the April 18th proceedings is in any event immaterial, since those proceedings, which culminated only in a direction by the judge to petitioner to appear before the grand jury on April 22d and answer the questions, could in no sense be considered a contempt proceeding. The contempt did not occur until April 22d. See *Brown* v. *United States*, *supra*, 359 U.S. at 49–50.

answer the questions (R. 30, 37–38).[5] Later on the same day, the grand jury and government counsel again appeared before Judge Levet to request "the assistance of the Court in regard to the witness Morry Levine" (R. 30). Petitioner and his counsel were also present (R. 30–45). The record indicates that at the beginning of these proceedings the following occurred (*ibid.*):

> The Court. Will those who have no other business in the courtroom please leave now? I have a Grand Jury proceeding.
>
> The Clerk: The Marshal will clear the court room.
>
> (Court room cleared by the Marshals.)[6]

Petitioner's counsel remained in the courtroom, however, and was present (together with petitioner, government counsel, the grand jury, and the court reporter) throughout the immediately ensuing proceedings, which

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[5] As on the occasion of petitioner's previous appearance before the grand jury (see fn. 3, *supra*, p. 4), his counsel was present in an anteroom, available for consultation at any time (R. 36–37). On this second occasion, as previously, petitioner based his refusals to answer on the privilege against self-incrimination (R. 37–38).

[6] This clearing of the courtroom is the only pertinent respect in which the proceedings in this case may have differed from those involved in *Brown v. United States*, *supra*, 359 U.S. 41. The *Brown* record did not indicate whether the courtroom was cleared on the occasion of the proceedings during which Brown was adjudicated in contempt (see Brief for the United States, No. 4, Oct. Term, 1958, pp. 46–48). This Court, accordingly, did not discuss in *Brown* the "claim, first advanced in the Court of Appeals, that the District Court proceeding was conducted in 'secrecy'" (359 U.S. at 51, n. 11).

culminated in the adjudication and sentencing of petitioner for contempt (R. 30–45).[7]

Petitioner's counsel requested the court to "follow the requirements of" Rule 42(b) of the Federal Rules of Criminal Procedure, *i.e.*, to proceed in accordance with the "notice and hearing" provisions of that Rule to try petitioner as for a completed contempt before the grand jury (R. 30–32). Government counsel, opposing this request, asked that the court follow the same procedure as had been followed in the *Brown* case (see 359 U.S. at 43, 47–52), *i.e.*, instead of proceeding to punish petitioner's "consummated contempt" in the grand jury room, to give him "another chance" to answer the questions, this time in the "physical presence of this Court," to be followed by punishment "for contempt under Rule 42(a)" should he persist in the court's presence to disobey the court's order (R. 32–33). The judge indicated that he would follow the latter procedure (R. 33; see R. 39).

After hearing further legal argument by petitioner's counsel (R. 33–36), and being apprised of petitioner's refusal of that morning to answer before the grand jury the questions which he had been ordered by the court to answer (R. 36–38), the judge directed petitioner to take the stand, reminding him that he was "still under oath" (R. 38–39). In response to a question by petitioner's counsel at this point as to whether "this proceeding now" was "the Grand Jury proceeding" or "a con-

[7] Whether the clerk, the marshal or marshals, and other court attendants (if any), or any of these, were present during these proceedings does not appear. The question is immaterial in the view we take of the case.

tempt proceeding", the judge replied, "The Court and the Grand Jury" (R. 39). Counsel said he "object[ed] to any such procedure" and again asked the court to proceed "in accordance with Rule 42(b)" (*ibid.*). The judge replied (*ibid.*): "We are proceeding in accordance with Rule 42(a)." The judge thereupon propounded each question to petitioner, with the direction that he answer (R. 39–41). Petitioner again refused to answer (*ibid.*), and stated, in response to a further question by the judge, that he would continue to refuse to answer if he were again taken to the grand jury room and asked the questions (R. 42).

The judge thereupon excused petitioner from the stand and stated that he would "listen to any reason why" he should not "adjudicate this witness in contempt" pursuant to Rule 42(a) of the Federal Rules of Criminal Procedure for a contempt—disobedience of a lawful order—committed in the physical presence of the court (R. 42–43). Petitioner's counsel replied that there were "several reasons" why the judge should not do so, and proceeded to renew various arguments which had previously been heard by the court and rejected (R. 43).[1] He did not, how-

[1] Petitioner's counsel had earlier argued (R. 30–32, 39; see *supra*, p. 7) that petitioner was entitled to be proceeded against, if at all, pursuant to the notice and hearing provisions of Rule 42(b) as for a completed contempt occurring in the grand jury room and so not in the actual presence of the court (cf. *Brown* v. *United States*, *supra*, 359 U.S. at 47–52, where this Court rejected a like argument by Brown); and he renewed this argument at this time (R. 43). In addition, he again pressed his contention that the scope of the immunity afforded by the applicable statutes was less broad than the

ever, mention or suggest (nor did anyone) as a reason why the judge should not forthwith pronounce judgment the fact that the judge's earlier order to clear the courtroom was still in effect, nor did anyone present request or suggest that that order be rescinded prior to the making of the contempt adjudication. The judge thereupon pronounced judgment of contempt (R. 43) and (after hearing counsel on the question of an appropriate sentence (R. 43–45)) sentenced petitioner to a year's imprisonment (R. 45).

The order of contempt (R. 2–3) and the certificate under Rule 42(a) (R. 3–5) were entered the following day, April 23, 1957. Petitioner's complaint concerning the "secrecy" of the proceedings during which the judgment and sentence were pronounced was made for the first time (like the similar complaint in the *Brown* case, see 359 U.S. at 51, n. 11) in the court of appeals.

SUMMARY OF ARGUMENT

The adjudication of petitioner in criminal contempt while the order excluding the general public from the courtroom for the grand jury proceeding was still in effect did not infringe any of petitioner's rights or prejudice him.

A. Petitioner's contempt was properly adjudicable summarily under Rule 42(a) of the Federal Rules of Criminal Procedure. *Brown* v. *United States*, 359 U.S. 41, 47–52. The essence of a summary adjudication is that no trial or hearing is required because

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constitutional privilege which petitioner had asserted, and he invoked by reference "all the other reasons stated by me during the course of this proceeding" (*ibid.*).

such judgment by certiorari is conferred on this Court by § 1254, Title 28, U. S. C. and is invoked pursuant thereto and Rule 37(b), Federal Rules of Criminal Procedure.

Questions Presented for Review

1. Whether the secrecy of the proceedings, including the adjudication and sentence for contempt under Rule 42(a) of the Federal Rules of Criminal Procedure, deprived petitioner of Due Process of Law in violation of the Fifth Amendment to the United States Constitution.

2. Whether the secrecy of the proceedings and of the adjudication and sentence of petitioner for criminal contempt under Rule 42(a) of the Federal Rules of Criminal Procedure deprived petitioner of a public trial as required by the Sixth Amendment to the United States Constitution.

Constitutional Provisions, Statutes and Regulations Involved

The pertinent constitutional provisions, statutes and regulations being lengthy are set forth as an appendix to this petition, *infra*, p. 22; their citations are: *United States Constitution*, Amendments V and VI: *Federal Rules of Criminal Procedure*, Rules 42(a) and (b), Title 18, U.S.C.

Statement of the Case

Petitioner (as was Emanuel Brown, 359 U. S. 41) is a principal of Young Tempo, Inc., a New York City dress manufacturer. T. & R. Trucking Company transported dresses between Young Tempo, Inc. in New York and Acme Dress Company in Midvale, New Jersey.

John Dioguardi (according to the government's information) is the actual, and one Rij the nominal, owner of the trucking company. In the Southern District of New York grand juries are conducting investigations of

racketeering and of the Riesel obstruction of justice case. Dioguardi, Rij and, possibly, others are the subjects of these investigations (R. 34, 35).

Petitioner under subpoena made numerous appearances before these grand juries (R. 26, 27). There petitioner was told by the prosecutor that he was to be indicted (R. 8, 26, 27).

In March, 1957 the prosecutor told petitioner's counsel that an investigation under the Motor Carriers Act was to be instituted, that petitioner would be subpoenaed to appear before the grand jury and that, since the immunity statute in the Interstate Commerce Act would apply, he could not interpose the Fifth Amendment plea (R. 12, 17).

Petitioner was then served with a subpoena requiring his appearance before the April, 1957 grand jury "to testify * * * in regard to an alleged violation of Sections 309, 322, Title 49 United States Code" (R. 15, 16). Petitioner appeared.

His counsel being present in the anteroom, petitioner was advised that he could consult with his attorney (R. 14, 15).

Petitioner was asked (R. 16): "* * * are you associated with Young Tempo, Inc.?" Petitioner requested leave to consult his attorney (R. 16). After such consultation, petitioner returned to the grand jury room and refused to answer the question on the ground of possible self-incrimination (R. 17).

The prosecutor then advised petitioner that the investigation was into possible violations of the Motor Carriers Act, that Section 305(d), Title 49, U. S. C., gave full immunity to any witness compelled to testify as to any matter arising under that Act and that petitioner could not plead the Fifth Amendment in this inquiry (R. 17, 18).

The foreman then directed petitioner to answer the question asked by the prosecutor. Petitioner repeated his

refusal to answer on the ground of possible self-incrimination (R. 18, 19).

After consulting with counsel, petitioner once more refused to answer the question on the same ground (R. 18, 19). Thereafter five more questions were put to petitioner by the prosecutor, all of which petitioner refused to answer on the ground of possible self-incrimination (R. 19, 20).[1]

After petitioner's refusal to answer the grand jury, prosecutor and petitioner and his counsel proceeded to District Judge Levet's courtroom (R. 5, 6).

The prosecutor there outlined the procedure requested by the government to be followed. For the grand jury he asked the court's aid in a direction to petitioner to answer the questions (R. 5, 6). The courtroom was cleared.

The prosecutor requested (R. 6) that the court proceed as in the case of *Emanuel Brown* v. *United States*, then on appeal to the Court of Appeals and subsequently decided by this Court (359 U. S. 41).

That procedure was, as outlined by the prosecutor, a preliminary determination by the court as to whether the witness had to answer the questions and, if so, a direction that he answer the questions, the return of the witness to the grand jury room and upon his further refusal there to answer the questions, the return of the grand jury to the court with a second request that the same questions be put by the court to the witness and, if the witness then

1. The questions which petitioner refused to answer are:
"* * * are you associated with Young Tempo, Inc.? (R. 16) * * * does Young Tempo, Inc. use a trucking company known as * * * the T. & R. Trucking Co.? * * * who do you know to be the owner or owners or the principal in interest or principals in interest of * * * the T. & R. Trucking Company? (R. 19) * * * are you associated with Acme Dress Co. in Midvale, New Jersey? * * * does the T. & R. Trucking Co. provide trucking services between Young Tempo, Inc. in New York City and the Acme Dress Co. in Midvale, New Jersey? * * * do you know if the T. & R. Trucking Co. * * * has applied for or obtained a permit from the Interstate Commerce Commission to operate as a contract trucker between New York, New York and Midvale, New Jersey?" (R. 20)

refused to answer, the government would ask that he be held summarily in contempt pursuant to Rule 42(a), Federal Rules of Criminal Procedure.

Petitioner's counsel requested (R. 6, 7) an adjournment, notice under Rule 42(b), Federal Rules of Criminal Procedure, a specification of charges and an opportunity to prepare for trial. Petitioner's counsel also requested compulsory process to require the production and attendance of witnesses, so that the issues of fact could be met (R. 6, 7). The court denied petitioner's motions (R. 8-13).

The grand jury stenographers then read their minutes of the grand jury proceedings (R. 13, 14, *et seq.*). Thereupon petitioner's counsel renewed his prior motions and applications, which were again denied (R. 21-23).

After argument (R. 23, *et seq.*) on the applicability of the immunity statute [Title 49, U.S.C. §305(d)], the court rendered its decision (R. 29). As in the case of *Emanuel Brown, supra,* it concluded that there was immunity, and that petitioner had to answer, and, therefore, directed him to answer the questions put to him before the Grand Jury.

The court then recessed the grand jury until April 22, 1957 at 10:30 A.M. with a direction to petitioner to attend (R. 29).

Petitioner returned to the grand jury room at the time appointed. The prosecutor put to him the six questions directed to be answered (R. 36-38), which petitioner refused to answer on the claim of possible self-incrimination.

The grand jury, petitioner and counsel then returned to the courtroom of District Judge Levet (R. 30).

The courtroom was cleared at the direction of the court (R. 30) and the proceedings were thenceforth held in secret.

At that time the prosecutor stated to the court that "the April 1957 regular Grand Jury once again requested

the assistance of the court in regard to the witness Morry Levine [petitioner]" (R. 30).

Application was then made by petitioner's counsel that the court follow Rule 42(b), Federal Rules of Criminal Procedure, and Due Process and that he be furnished with notice of the charges and an opportunity to prepare and to frame his defenses to the charges (R. 30-35). The court overruled the application (R. 32-35).

Petitioner's counsel also requested an adjournment to obtain compulsory process and subpoena witnesses and renewed all the motions and applications which he had made at the prior session (R. 32-35). These motions and applications were overruled by the court (R. 32-35).

The grand jury stenographer read her minutes (R. 36, *et seq.*), which disclosed that petitioner had once more refused before the grand jury to answer the six questions on the ground of possible self-incrimination.

The prosecutor then requested that the court put to petitioner the questions declined by him to be answered and direct him to answer (R. 38). Over his counsel's objection the court ordered petitioner to take the stand in the courtroom (R. 38).

The court did not swear petitioner, but stated that he was "still under oath • • • with respect to what is said here, and with respect to any testimony • • •" (R. 39).

On inquiry by petitioner's counsel as to whether the proceeding was "the grand jury proceeding", or "a contempt proceeding" the court stated that it was "the Court and the Grand Jury" and that it was a "proceeding in accordance with Rule 42(a)" (R. 39).

Petitioner's counsel objected to the procedure, requested that the court proceed in accordance with Rule 42(b) and excepted to petitioner's "being put on the stand in a proceeding in which he is in jeopardy and which involves the possibility of a criminal contempt and being required

to testify in a proceeding in which he is in jeopardy in violation of his constitutional rights" (R. 39). The court overruled the applications and objections (R. 39).

The court then put to petitioner the same questions (*supra*, p. 4), over the objection of his counsel to each question and to each direction (R. 39-42). As to each such question petitioner refused to answer on the ground of possible self-incrimination (R. 39-42).

The court at the prosecutor's request inquired of petitioner whether, if he returned to the grand jury room, he would still decline to answer (R. 42). The court overruled counsel's objection to this question and petitioner answered that he "must decline to answer these questions • • • on the ground that they may tend to incriminate him • • •" (R. 42).

The prosecutor then asked the court to "adjudicate" petitioner "in contempt of this court for a violation of the lawful order and direction of the court • • • for a contempt committed in the physical presence of the Judge" (R. 42).

After listening to petitioner's counsel's reasons (R. 42, 43) why petitioner should not be adjudicated in contempt, the court stated that by reason of petitioner's conduct and failure to answer he was forced to adjudicate him in contempt (R. 43).

Government counsel was then heard on the question of sentence (R. 43, 44).

After hearing petitioner's counsel on the quantum of sentence, the court sentenced petitioner to be confined for a period of one year and admitted him to bail pending appeal (R. 44, 45).

SUMMARY OF ARGUMENT

The proceedings culminating in petitioner's conviction for criminal contempt for refusing to answer before the court and grand jury the questions which he had refused to answer before the grand jury, although directed so to do by the court, were secret throughout. Under *Re Oliver*, 333 U. S. 257, the secret proceedings here were violative of Due Process and of petitioner's right to a public trial under the Sixth Amendment to the United States Constitution. This is so, even though the *Oliver* case arose in a State court and was decided by this Court under the Fourteenth Amendment. A recalcitrant Federal grand jury witness cannot have less rights or protection than a State grand jury witness.

That petitioner was a grand jury witness should not affect his right to a public trial. The secrecy of the grand jury proceeding yields to the supervening interest in the protection of the constitutional right to a public trial and adherence to Due Process.

This case poses for this Court the question of the establishment of a basic rule as to the rights of a Federal recalcitrant grand jury witness, especially with respect to a public proceeding, since other rights normally accorded to defendants in criminal prosecutions, such as jury trial and notice and specification of charges, have been held not to apply to such persons.

The presence of petitioner's counsel throughout the secret courtroom proceedings did not convert the same into a public hearing or trial. The right to a public trial under the Sixth Amendment and the requirements of Due Process is independent of that to counsel and the satisfaction of any putative right of a recalcitrant grand jury witness to counsel in a summary contempt proceeding does not make the proceedings, as here, public. Indeed,

it would not have been sufficient if, in addition to counsel, relatives, newspaper men and members of the Bar were also present. The opening of the doors of the courtroom for the admittance of spectators was necessary to constitute this proceeding public.

Nor was the petitioner's right to a public trial waived, although no objection to the clearing of the courtroom and the secrecy of the proceedings was taken by petitioner or his counsel. Consequently this Court is not precluded from considering the matter. The right to a public trial under the Sixth Amendment and Due Process cannot be waived by non-objection. There must be an express conscious surrender of the right to make such waiver effective. The standards set by this Court for the effective waiver of the constitutional rights to jury trial and the assistance of counsel apply with equal force to the waiver of the right to a public trial. There is absent here such express conscious waiver by petitioner and his counsel.

Since petitioner was deprived of his right to a public trial, prejudice to him is presumed and he is not required to make any such showing.

An important question in this case is when petitioner's right to a public hearing accrued. Since petitioner's jeopardy attached at least at the time when he was ordered by the court to take the stand in the judge-grand jury proceeding in the courtroom, his right to a public hearing necessarily accrued no later than that point. As described by the District Court, the proceeding then became one under Rule 42(a), Federal Rules of Criminal Procedure, and it was, thus, converted from an inquisitorial to a punitive function. It was at least then that the doors of the courtroom had to be opened to the public.

An assertion that the right to a public proceeding accrued only at the time of adjudication and conviction for

contempt is contrary to reason and justice and would reduce this right in this type of contempt case to an absurdity and a meaningless gesture, especially where the alleged contempt did not occur in open court.

In any event, the Court's power to punish for contumacious conduct committed in its face and presence is limited to such occurrences which take place in open court. Conviction and punishment without notice and charges is Due Process in only one type of case, namely, contumacious conduct in open court in the presence of the Court. In every other case Due Process requires notice, charges and hearing.

Here the alleged contumacious conduct did not occur in open court but in secret proceedings. Under Due Process the lower court had no jurisdiction to adjudicate and convict petitioner summarily without notice, charges and hearing. Having done so, petitioner has been deprived of Due Process under the Fifth Amendment to the United States Constitution.

ARGUMENT

I.

The secrecy of the proceedings culminating in petitioner's conviction for criminal contempt requires a reversal under the Sixth Amendment to the United States Constitution and Due Process of law.

The record in this case is clear that the proceedings throughout were secret (R. 30).[2] Although the alleged contempt was not committed in open court, petitioner was in the same secret session convicted of criminal contempt therefor.

This case is squarely within the holding in *Re Oliver*, 333 U. S. 257. In contravention of that decision the court proceedings leading to the summary conviction for criminal contempt and the actual adjudication and sentence of petitioner were held *in camera*.

The factual situation in this case is particularly apposite to that in the *Oliver* case, *supra*. In that case, a Michigan Circuit Judge sat as a one man grand jury, constituting in one person a "Judge-Grand Jury" and this entity put the questions to the witness and upon his contumacious conduct before it held the witness guilty of criminal contempt and sentenced him to jail—all this in secret!

In this case a Federal grand jury and the Judge were converted into a "Judge-Grand Jury" and in secret, this entity (R. 39) put the questions to petitioner and on his refusal to answer held petitioner—likewise *in camera*—in contempt and sentenced him to jail.

Indeed, the District Court, on being asked, when it ordered petitioner to the stand in the courtroom, "What

2. In *Brown* v. *United States*, 359 U.S. 41, a companion to this case, this Court did not consider that petitioner's claim that the proceeding in the District Court was conducted in secrecy, because of the state of the record.

is this proceeding now? Is this the Grand Jury proceeding, or is it a contempt proceeding?", replied "The Court and the Grand Jury" (R. 39).

The secrecy of such proceedings was condemned by this Court in the *Oliver* case, *supra*. Mr. Justice Black there clearly pointed out the reasons why the requirements of grand jury secrecy cannot apply to contempt proceedings for a witness's misbehavior before the grand jury.

Mr. Justice Black said at page 264:

> "• • • Grand juries may examine witnesses in secret sessions. • • • Many reasons have been advanced to support grand jury secrecy. • • • But those reasons have never been thought to justify secrecy in the trial of an accused charged with violation of law for which he may be fined or sent to jail. Grand juries investigate. • • • They do not try and they do not convict. They render no judgment. • • • Nor may he [the defendant] be fined or sentenced to jail until he has been tried and convicted after having been afforded the procedural safeguards required by due process of law. ***Even when witnesses before grand juries refuse to answer proper questions, the grand juries do not adjudge the witnesses guilty of contempt of court in secret or in public or at all. Witnesses who refuse to testify before grand juries are tried on contempt charges before judges sitting in open court. • • • the due process clause may apply with one effect on the judge's grand jury investigation, but with quite a different effect when the judge-grand jury suddenly makes a witness before it a defendant in a contempt case.***
>
> "Here we are concerned, ***not with petitioner's rights as a witness in a secret grand jury session,*** but with his rights as a defendant in a contempt proceeding. The powers of the judge-grand jury who tried and convicted him in secret • • • must likewise be measured • • • by the constitutional

> stand' ls applicable to court proceedings in which an ac sed may be sentenced to fine or imprisonment or h .." [Emphasis supplied.]

The i' osition of secrecy in this proceeding also violated th Sixth Amendment to the United States Constitution w' ch guarantees a public trial in all criminal prosecutions.

This Court has held that in proceedings which result in a judgment of criminal contempt, the defendant is entitled to the rights accorded to defendants in criminal cases. *Cammer* v. *United States*, 350 U. S. 399, 403; *Re Michael*, 326 U. S. 224; *Nye* v. *United States*, 313 U. S. 33; *Michaelson* v. *United States*, 266 U. S. 42, 66; *Gompers* v. *Buck's Stove & Range Co.*, 221 U. S. 418, 444.

The defendant in a criminal contempt case should also be held to be entitled to the guarantee of a public trial.[3]

The rationale of the requirement of a public trial is grounded on firm principles—adherence to which has always been thought to be vital to a free democratic society.

As pointed out by Mr. Justice Black in the *Oliver* case, *supra*, page 268:

> **"The traditional Anglo-American distrust for secret trials has been variously ascribed to the notorious use of this practice by the Spanish Inquisition, to the excesses of the English Court of Star Chamber, and to the French monarchy's abuse of the lettre de cachet. All of these institutions obviously symbolized a menace to liberty. In the hands of despotic groups each of them had become an instrument for the suppression of political and religious heresies in ruthless disregard of the right**

3. *Compare:* Frankfurter and Greene, *The Labor Injunction*, 226—"Since a charge of criminal contempt is essentially an accusation of crime, all the constitutional safeguards available to an accused in a criminal trial should be extended to prosecutions for such contempt." See *Gompers* v. *United States*, 233 U.S. 604, 610, 611, Holmes, J.

> of an accused to a fair trial. Whatever other benefits the guarantee to an accused that his trial be conducted in public may confer upon our society, the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution. The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power."

This Court heretofore has not decided the applicability of the constitutional mandate for a public trial in criminal cases to Federal summary proceedings for contempt, and more particularly, against a recalcitrant grand jury witness.

The answer to that problem is, however, directly given in *Re Oliver*, 333 U.S. 257. While that was a State summary contempt case in origin and decided under the Due Process clause of the Fourteenth Amendment, there can hardly be any question that it applies to a Federal summary contempt proceeding against a recalcitrant grand jury witness. If this were not so, it would mean that under the Fourteenth Amendment defendants in State summary contempt proceedings have greater rights than persons similarly situated in the Federal courts under the Fifth Amendment Due Process provision and the Sixth Amendment requirement of a public trial. See also VI, p. 20, *et seq.*, *infra*.

The fact that petitioner was a grand jury witness cannot affect his right to a public trial.[4] *Re Oliver*, *supra*.

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4. Examples of Federal contempt proceedings against recalcitrant grand jury witnesses conducted in open court are: *United States* v. *Hoffman*, 185 F. 2d 617 (C.A. 3) [341 U.S. 479]; *Powell* v. *United States*, 226 F. 2d 269 (App. D.C.) [Appendix to Appellant's Brief in Court of Appeals, p. 88, fol. 100]; *United States* v. *Trumb*, 232 F. 2d 43 (App. D.C.) [Joint Appendix in Court of Appeals, p. 28, fol. 321]; *Rogers* v. *United States*, 340 U.S. 367. *Curcio* v. *United States*, 354 U.S. 118.

Examples of State court contempt proceedings in open court against recalcitrant grand jury witnesses are: *Ex parte Gould*, 60 Texas Cr. 442; *State* v. *Judge*, 32 La. Ann. 1222; *People* v. *Kelly*, 24 N.Y. 74.

Indeed, even if it could be said that requiring publicity for proceedings such as these involving a grand jury investigation may impair the investigative powers of the inquest, the choice must be made in favor of Due Process and fair play as against secret inquisition. [This Court made a comparable choice in *Jencks* v. *United States*, 353 U.S. 657. See *United States* v. *Andolschek*, 142 F. 2d 503 (C.A. 2).]

Moreover, Rule 6(e), Federal Rules of Criminal Procedure, recognizes the possible breach of grand jury secrecy in the interest of justice in a judicial proceeding. The protection of a defendant's constitutional right to a public trial is undeniably in the interest of justice. Unquestionably the proceeding here was judicial.

The necessity of restraint upon the judiciary based upon other than their self-control has been recognized by this Court. The most potent force in this regard is publicity, because, as was said, in the *Oliver* case (p. 270), the "knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power."[5]

This Court is, thus, faced with a fundamental question, that is, the extent to which the exercise of the summary contempt power of the Federal courts against recalcitrant grand jury witnesses is subject to constitutional safeguards established to protect an accused in a criminal case.

The erosion of the constitutional rights of this and other criminal contempt defendants proceeds apace. Thus he has no right to trial by jury. *Green* v. *United States*, 356 U. S. 165. If he is a recalcitrant grand jury witness, he may be compelled to take the stand and is not entitled to notice, specification of charges and a hearing. *Brown* v.

5. It is also a necessary restraint upon the Executive branch, for otherwise, a witness pressed into an immediate appearance before a grand jury by a "forthwith" subpoena and seemingly uncooperative could be questioned in secret, and in the absence of friend, counsel and the public, could be convicted. Even the mere admission of the press could be a boon to such a witness.

United States, 359 U. S. 41. If the judge goes to the grand jury room to deal with him, he may not even be entitled to counsel.[6] If now the right to a public trial should go, when and where is the line to be drawn?

II.

The presence of counsel throughout the courtroom proceedings did not make the hearing public.

While petitioner's counsel was present throughout the courtroom proceedings, it is, nevertheless, true that a "secret proceeding is no less secret because the defendant is allowed to have counsel" (Warren, Ch. J., *Brown* v. *United States*, *supra*, diss. op., fn. 15).

The evils inherent in a secret proceeding are not lessened or eradicated by the fact that counsel for the accused is also present. The opportunity for intimidation or persecution and the consequent possible abuse of judicial power remain. The advocate militant in such *in camera* proceedings may merely be another candidate for a contempt adjudication.

The Sixth Amendment requires not only that a defendant in a criminal prosecution have counsel, but also that his trial be public. Consequently the right to counsel is independent of that to a public trial. Nor can the right to a public trial be successfully equated with the right to counsel. The allowance of counsel to a defendant cannot be the equivalent of a public trial, nor under the Constitution can the converse be the equivalent of the allowance of counsel. Each is a basic and separate right.

Indeed in many cases convictions of crimes have been reversed, although not only did defendant have counsel

6. It is not inconceivable that he may be denied counsel, even if the Judge does not go to the grand jury room. See *Owens* v. *Dancy*, 36 F. 2d 882, 885 (C.A. 10).

present but members of the Bar and representatives of the press also were there.

In *Tanksley* v. *United States,* 145 F. 2d 58 (C.A. 9), the Court of Appeals reversed because of the denial of a public trial. Defendant's counsel was present in court along with relatives and the press. Although there was less secrecy in the *Tanksley* case, *supra,* than here the conviction was reversed.

Similarly, in *Davis* v. *United States,* 247 Fed. 394 (C.A. 8), all spectators were cleared from the courtroom, except relatives, members of the bar, newspaper reporters and defendant's attorneys. The Court of Appeals reversed.

In *United States* v. *Kobli,* 172 F. 2d 919 (C.A. 3), the court excluded from the courtroom all persons except jurors, witnesses, lawyers, members of the press and counsel for the defendants. The Court of Appeals reversed.

As the Court in the *Davis* case, *supra,* cogently pointed out, relatives, attorneys, witnesses or newspaper reporters are not "the exclusive representatives of the public." *A fortiori* the petitioner's counsel was not a representative of the public.[7]

Hence the mere presence of counsel does not make a criminal proceeding a public hearing. Consequently the secret proceeding in which petitioner was convicted of criminal contempt violated his constitutional rights and the conviction must be reversed.

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7. Examples of convictions reversed in State courts, because the trial was not public, although counsel was present, are: *State* v. *Hensley,* 75 Ohio 255; *People* v. *Murray,* 89 Mich. 276; *People* v. *Yeager,* 113 Mich. 228; *State* v. *Keeler,* 52 Mont. 205; *State* v. *Beckstead,* 96 Utah 528; *State* v. *Bonza,* 72 Utah 177; *State* v. *Osborne,* 54 Or. 289; *Neal* v. *State,* 86 Okla. Cr. 283.

In a Note, 49 *Col. L. Rev.* [1949], 110, 112, it is concluded that, under the cases, for criminal proceedings to be public, some persons other than court officers, jurors, parties to the controversy, witnesses and counsel must be present. Even in the minority of jurisdictions, less observant of the strict enforcement of the right to a public trial, especially in cases of a salacious nature, the presence of someone other than the participants in the trial is nevertheless required. *Ibid,* 114. See also 60 *Dickinson L. Rev.* [1955-56], 21, *et seq.*

III.

The non-objection by petitioner and his counsel to the exclusion of the public was not a waiver of the right to a public trial. This Court is not thereby precluded from considering the matter.

The record does not disclose that any specific objection was made to the clearing of the courtroom and the resulting exclusion of the public (R. 30). Nor was any exception at any time taken.[8]

It is respectfully submitted that the right to a public trial is so fundamental that the infringement thereof cannot be overlooked on review because of the failure of counsel or petitioner to raise it in the lower court. There was, moreover, no conscious express waiver by petitioner or his counsel of his constitutional right to a public trial. A public trial cannot be waived by non-objection or silence. *State* v. *Hensley*, 75 Ohio 255.

In *State* v. *Hensley, supra*, the court said:

> "It is, however, insisted by cousel for the state that, because no specific objection or exception was entered by the defendant at the time the order was made or was being enforced, the error, if any was committed, cannot now be taken advantage of. This objection ignores the force and effect of the constitutional provision. The right to a public trial is guaranteed. It is of the same high order of right as the other guaranties embodied in the section * * *."

See also *State* v. *Delzoppo*, 86 Ohio App. 381; *E. W. Scripps Company* v. *Fulton*, 100 Ohio App. 157; *People* v.

8. While it appears that throughout the proceeding petitioner's counsel sought a hearing on notice under Rule 42(b), which could only mean an open trial, no specific request was made for a public or open hearing. Nor was such request necessary, since the alleged contempt was not committed in open court. *Re Oliver*, 333 U.S. 257. See p. 20, *infra*.

Jelke, 308 N. Y. 56; *State* v. *Haskins*, 38 N. J. Super. 250; *Wade* v. *State*, 207 Ala. 1, 104; *Stewart* v. *State*, 18 Ala., App. 622; *State* v. *Marsh*, 126 Wash. 142. See Note, 49 *Columbia L. Rev.* [1949] 110, 118; 60 *Dickinson L. Rev.* [1955-56] 21, 29.

No serious consideration should be given to a contention that the right to a public trial can be surrendered in any manner other than as trial by jury in a criminal case may be waived. No preferment may be given to the right to jury trial over that to a public trial. Both rights are of the same ancient common law lineage. *Radin*, The Right To A Public Trial, 6 *Temple L. Q.* [1931-32] 381. Just as a jury trial cannot be foregone, except expressly and in an intelligent, conscious manner [Rule 23(a), Federal Rules of Criminal Procedure], so can only the right to a public trial be waived.

Rule 23(a), Federal Rules of Criminal Procedure, does not declare any new rule as to what is necessary to make effective a waiver of trial by jury. It merely reiterated the high standards established in prior cases.

Thus in *Patton* v. *United States*, 281 U. S. 276, 312, this Court declared that "the right of the accused to a trial by a constitutional jury" must "be jealously preserved" and that "before any waiver can become effective" there must be had "the express and intelligent consent of the defendant", the "consent of government counsel" and the "sanction of the court" and that "the duty of the trial court is not discharged as a mere matter of rote, but with sound and advised discretion". *Adams* v. *United States*, 317 U. S. 269, is to the same effect.

Similarly the right to counsel must be intelligently, consciously and competently waived by the accused. *Johnson* v. *Zerbst*, 304 U. S. 458.

Here indeed, in this case, under the standards set by this Court for the waiver of constitutional rights of equal rank, there was no waiver of the right to a public trial.

IV.

The petitioner is not required to show prejudice to him by reason of the deprivation of a public trial. Given the deprivation of this right, prejudice is presumed.

It is fundamental that where the right to a public trial has been denied, prejudice is presumed absolutely. *Davis* v. *United States*, 247 Fed. 394, 398 (C.A. 8); *Tanksley* v. *United States*, 145 F. 2d 58 (C.A. 9); *United States* v. *Kobli*, 172 F. 2d 919, (C.A. 3). See *People* v. *Jelke*, 308 N. Y. 56; *People* v. *Micalizzi*, 223 Mich. 580; *People* v. *Yeager*, 113 Mich. 228; *People* v. *Murray*, 89 Mich. 276; *State* v. *Keeler*, 52 Mont. 205; *Tilton* v. *State*, 5 Ga. App. 59; *State* v. *Beckstead*, 96 Utah 528; *State* v. *Bonza*, 72 Utah 177; *State* v. *Jordan*, 57 Utah 612; *State* v. *Haskins*, 38 N.J. Super. 250; *State* v. *Osborne*, 54 Or. 289; *People* v. *Hartman*, 103 Cal. 242; *People* v. *Byrnes*, 84 Cal. App. 2d 72; *Neal* v. *State*, 86 Okla. Cr. 283.

This is the rule applicable to any deprivation of constitutional rights and must be applied here.

V.

Petitioner's right to a public hearing accrued no later than the time when he was directed to take the stand by the District Court.

The proposition that only the adjudication and sentence on April 22, 1957 of petitioner for contempt was required to be public is untenable, because it has no relationship to the reality of what transpired. When on April 22, 1957

the court called petitioner to the stand (R. 38, 39) to put the questions to him and direct him to answer, it stated to petitioner's counsel that "we are proceeding in accordance with Rule 42(a)."

The court's language makes clear that it was proceeding under Rule 42(a) and that it considered that the proceedings about to be conducted by it were in substance and effect contempt proceedings.

It was, at the very least, if not earlier, when petitioner was called to the stand (R. 38, 39), that he was in jeopardy and that his right to an open hearing, as well as to all the other rights of a defendant in a criminal contempt cause, accrued.

At that point the court knew that petitioner had, despite its direction, continued his refusal to answer before the grand jury and the ultimate result had clearly been foreshadowed.

Whether it was, as the court designated it, a proceeding under Rule 42(a) or, as the Court of Appeals in the *Brown* case (247 F. 2d 332) described it, a proceeding ancillary to the grand jury, or, as this Court considered it in the *Brown* case (359 U. S. 41), a continuation of the grand jury proceeding, the fact is that the entire proceedings on April 22, 1957 (R. 30, *et seq.*) were a trial, because petitioner was in jeopardy of his liberty and in that event was entitled to have it conducted publicly.

A contention that the right to a public trial could only have accrued at the time of adjudication is contrary to reason and justice. It would reduce this right in this type of contempt case to an absurdity and a meaningless gesture, especially where the alleged contempt did not occur in open court. If the right to a public trial has a social purpose and function, then it is the proceedings which lead up to the conviction, whether of contempt or of any other crime, which require the admission of the

public. Certainly in a trial of a crime other than contempt no one would attempt to assert that the formal conviction of a defendant was all that was required to be public.

In effect in this proceeding prior to the adjudication, the court was ascertaining the facts upon which it would make its determination whether it should convict petitioner of contempt. The trial was all that went before the actual adjudication and the opening of these prior proceedings to the public was essential to constitute it a valid and constitutional proceeding.

The right to a public trial accrued to petitioner when he became in jeopardy of his liberty. On the record here it is clear that when he was brought down for the second time from the grand jury room to appear before the judge as a recalcitrant witness theretofore directed to answer, who had nevertheless once more refused to answer, and he was ordered to the stand, petitioner was then, under the procedure followed and approved in *Brown* v. *United States*, 359 U. S. 41, positively in jeopardy.

For then the proceeding immediately shifted from inquisitorial to punitive function which converted it from a grand jury investigation to a proceeding in criminal contempt (*Re Oliver*, 333 U. S. 257, 278, 279, Rutledge J.).

Beyond doubt this shift took place when petitioner was summoned to the witness stand in the courtroom and the court put the questions of the grand jury to him. The trial court itself considered that this conversion had then occurred because he said in response to counsel's question (R. 39) "We are proceeding in accordance with Rule 42(a)." The trial court's own picture of this proceeding was that this was a proceeding leading to a conviction or acquittal for criminal contempt; it was no longer inquisi-

torial—the questions were not put to petitioner for the purpose of obtaining the information for the use of the grand jury, but for the purpose of establishing a case punishable under Rule 42(a).

VI.

Since the alleged contempt was not committed in open court, it was a denial of Due Process summarily to convict petitioner in secret and without notice, charges and hearing.

But under Due Process petitioner's position is even more basic. It affects the trial court's power to punish petitioner summarily, as though for a contempt committed in the face and presence of the court, without notice or other compliance with Rule 42(b).

Such summary adjudication and punishment is Due Process only when the contumacious act is committed in "open court." *Cooke* v. *United States*, 267 U. S. 517, 536, 537; *Re Oliver*, 333 U. S. 257, 273-278. It is not enough to confer such summary jurisdiction that the wrongful act be committed in the face of the court.

As was made clear in *Cooke* v. *United States, supra*, 536, if the contempt is not in "open court", there is no right or reason to dispense with notice, charges and hearing. Due Process precludes such dispensation. ["Open court" in this context means public, *i.e.*, open to spectators. *Black's Law Dictionary* (2d Ed., 1910) 854; *United States* v. *Ginsberg*, 243 U. S. 472.]

Hence, in this case the court could not proceed summarily without notice, charges and hearing, since the alleged contempt was not committed in "open court", but in secret.

To constitute the action of the court here Due Process it was a necessary prerequisite that the calling of petitioner

to the stand, the putting to him of the questions and his refusal to obey the court's direction and to answer take place in "open court".

Petitioner was, therefore, denied Due Process, from the moment that in a secret proceeding against him as a recalcitrant grand jury witness he was called to the stand in the courtroom.

CONCLUSION

The judgment of conviction of petitioner for criminal contempt should be reversed and his acquittal directed.

Respectfully submitted,

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J. BERTRAM WEGMAN,
Counsel for Petitioner.

APPENDIX

Relevant Statutes

Federal Rules of Criminal Procedure:

Rule 42. Criminal Contempt

(a) *Summary Disposition.* A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the fact and shall be signed by the judge and entered of record.

(b) *Disposition upon Notice and Hearing.* A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

United States Constitution, Amendments V and VI:

V.

"No person * * * shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law;"

VI.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * * and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense;"